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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

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No. .....

CHARLENE MITCHELL, *et al.*,

Appellants,

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JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

Appellants appeal from the final order of a three-judge court of the United States District Court for the District of Minnesota dismissing their complaint as moot and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinions Below

The initial opinion dated Oct. 2, 1968, granting an order requiring the appellee, Joseph L. Donovan, to place the names of appellant presidential and vice-presidential candidates on the Minnesota general election ballot is

reported in 290 F. Supp. 642 (D. Minn. 1968) and is set out in the Appendix, *infra*, pp. 25-37. The later opinion July 14, 1969, granting an order allowing the amendment to the complaint, and dismissing the complaint, has not yet been officially reported. It is set out in the Appendix, *infra*, pp. 38-47.

Jurisdiction

Appellants brought this action in the United States District Court for the District of Minnesota for a temporary and a permanent injunction requiring the Secretary of State of Minnesota to accept the appellants' nominating petitions and to place the names of appellants Mitchell and Zagarell on the November, 1968 general election ballot in Minnesota and for a declaratory judgment that the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, is unconstitutional and void. 50 U. S. C. §§841 and 842 were cited by the appellees as barring the appellant candidates from the ballot.

The action was brought under 28 U. S. C. §1331, 28 U. S. C. §1343 (3) and (4), 42 U. S. C. §§1981, 1983, and 1988, and 28 U. S. C. §§2282 and 2284.

The three-judge court dismissed the appellants' complaint as moot on July 14, 1969, which order was entered on that same date. The notice of appeal was filed on August 13, 1969 in the United States District Court for the District of Minnesota in the Third Division.

The final order of the three-judge court dismissing the complaint is appealable to the Supreme Court of the United States under 28 U. S. C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime*

and Avocado Growers, Inc. v. *Jacobsen*, 362 U. S. 73 (1960), *Clark* v. *Poor*, 274 U. S. 554 (1927).

Statutes Involved

50 U. S. C. §841 provides:

§841. Findings and declarations of fact

The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that

of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed. Aug. 24, 1954, c. 886, §2, 68 Stat. 775.

50 U. S. C. §842 provides:

§842. Proscription of Communist Party, its successors and subsidiary organizations

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of

the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or to any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended. Aug. 24, 1954, c. 886, §3, 68 Stat. 776.

Questions Presented

1. Whether the three-judge court erred in dismissing the complaint on the ground of mootness, in view of the fact that there is uncontradicted evidence that the appellant Communist Party of Minnesota will participate in future Minnesota elections, and that the appellee Attorney General of the State of Minnesota has firmly established state policy that 50 U. S. C. §§841 and 842 (Communist Control Act of 1954) prohibits appellants from appearing on any Minnesota election ballots, by a formal public opinion of the Attorney General to this effect and by maintaining this position before the three-judge court after the three-judge court granted temporary relief.
2. Whether 50 U. S. C. §§841 and 842 is a bill of attainder in violation of Article I, Section 9, Clause 3 of the U. S. Constitution, and when applied by the states, is a violation of Article I, Section 10, Clause 1 of the U. S. Constitution.
3. Whether 50 U. S. C. §§841 and 842 is an ex post facto law in violation of Article I, Section 9, Clause 3 of

the U. S. Constitution, and when applied by the states is a violation of Article I, Section 10, Clause 1 of the U. S. Constitution.

4. Whether 50 U. S. C. §§841 and 842 violates freedom of speech, press, assembly and petition guaranteed by the First Amendment to the U. S. Constitution.

5. Whether 50 U. S. C. §§841 and 842 violates due process as protected by the Due Process Clause of the Fifth Amendment to the U. S. Constitution by not being reasonably restricted to the evil which it purports to control.

6. Whether 50 U. S. C. §§841 and 842 violates procedural due process as protected by the Due Process Clause of the Fifth Amendment to the U. S. Constitution by depriving an organization of liberty and property without affording those affected an adversary hearing, adequate notice of the charges, the right to counsel, the right to present evidence, the right to confront and cross-examine witnesses, the right to a judicial determination and written findings of fact, and the right to a written appeal.

7. Whether the action of the appellees in refusing to accept the nominating petitions from the appellants denied them due process of law and equal protection of the laws in that the deprivation of the right of the citizens of Minnesota to vote is a violation of due process and equal protection of the laws.

8. Whether the final order of the three-judge court dated July 14, 1969 denies appellants equal protection of the laws by requiring the appellants to follow additional procedures not required of other political candi-

dates by making it necessary that the candidates initiate a lawsuit each and every time they wish to appear on the Minnesota General Election ballot.

9. Whether 50 U. S. C. §§841 and 842 is in fact within the legislative power of Congress in that Article II, Section 1, Clause 2 of the U. S. Constitution limits the power of the federal government from interfering with the qualifications of federal presidential electors.

Statement of the Case

In accordance with M. S. A. 202.09, the Communist Party of Minnesota secured the signatures of over two thousand eligible voters of the State of Minnesota on a petition nominating the presidential and vice-presidential candidates of the Communist Party, U. S. A., appellants Charlene Mitchell and Michael Zagarell, which entitled the names of those candidates together with their party designation to be placed on the Minnesota General Election ballot for the 1968 election. The appellants, Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgensen, Trygve Larsen, Carl Lund, and Betty M. Smith, were also named on the nominating petition as candidates for the office of presidential elector (Affidavits of: Betty M. Smith, September 11, 1968; Michael Zagarell, September 10, 1968; James Erickson, September 10, 1968; Elmer Borman, September 10, 1968; Trygve Larsen, September 10, 1968; Earl Sorg, September 10, 1968).

Within the time limit set by Minnesota Statute 202.11(2), the nominating petition, with 2,394 signatures, was presented to appellee, Secretary of State of Minnesota, Joseph

L. Donovan, for filing. Upon the advice in an official written opinion of the appellee, Attorney General of Minnesota, Douglas M. Head, dated September 9, 1968, the Secretary of State refused to accept the nominating petition for filing (Affidavit of Lynn S. Castner, September 11, 1968; written refusal of appellee Secretary of State Donovan, September 9, 1968).

The written opinion of the State Attorney General stated that the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, bars the Secretary of State from accepting and filing the nominating petition submitted by the Communist Party of Minnesota and the Communist Party, U. S. A. (Affidavit of Lynn S. Castner, September 11, 1968).

The appellants then brought an action in the court below seeking a temporary and permanent injunction requiring appellee Secretary of State Donovan to accept and file the aforesaid nominating petition and to include the names of appellant candidates Charlene Mitchell and Michael Zagarell together with their party designation on the November 5, 1968 General Election ballot. A declaratory judgment was also sought to declare the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, unconstitutional and void in that it violates the following provisions of the United States Constitution: Article I, Section 9, Clause 3; Article 1, Section 10, Clause 1; Article II, Section 1, Clause 2; Article IV, Section 2, Clause 1; Article IV, Section 4; and the First, Fifth, Tenth, Twelfth, and Fourteenth Amendments (Complaint).

Chief District Judge Edward J. Devitt notified the United States Attorney General of the constitutional questions involved as required by 28 U. S. C. §2043 on Sep-

tember 24, 1968 (Notice to U. S. Attorney General, September 24, 1968).

United States Attorney for the District of Minnesota, Patrick J. Foley, appeared *amicus curiae* and urged that the Act is meant to disable the party as a party only and not its members, and he suggested that the right of Mitchell and Zagarell to appear on the ballot, and the right of the nominees for presidential electors to be credited with the votes cast for Mitchell and Zagarell, depended in no degree on their status as nominees of the national or local Communist Party. He argued that, as a matter of Minnesota law, Mitchell and Zagarell are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and concluded that no "right, privilege or immunity" of the Communist Party as such is involved in this lawsuit. It was therefore his view that the Communist Control Act of 1954 did not prohibit the Secretary of State from accepting the nominating petitions and including the nominees upon the ballot as candidates of the Communist Party (Opinion of the three-judge court, October 2, 1968, Appendix).

He also cited the "familiar rule that the decision of constitutional questions should be avoided where fairly possible," *Communist Party of the U. S. A.* v. *Catherwood*, 367 U. S. 389 (1961), and urged that the court should hesitate long before adopting an interpretation that requires resolution of "difficult constitutional questions." 367 U. S. at 394. The brief of the United States admitted the seriousness of many of the appellants' constitutional challenges to the law. Claims that the law is a bill of attainder, that it unjustifiably abridges First Amendment rights and the rights to vote and to run for elective office, and that Con-

gress lacks power to establish qualifications for presidential electors are recognized as being substantial and raising difficult constitutional questions (Opinion of the three-judge court, October 2, 1968, Appendix).

The three-judge court granted a temporary injunction on October 2, 1968, reported as *Mitchell* v. *Donovan,* 290 F. Supp. 642 (D. Minn. 1968), which ordered the appellee Secretary of State Donovan to accept the appellants' nominating petition and to place the named candidates together with their party designation on the November 5, 1968 general election ballot. The appellee Donovan complied, and the appellant candidates' names did appear on the ballot in Minnesota as ordered.

The appellants appeared on the November 5, 1968 general election ballot with other minority party candidates and the following votes were received by minority party candidates in the election:

Wallace and Griffin, American Party, Nominated by Petition, 66,931 votes;

Holstead and Boutelle, Socialist Workers' Party, Nominated by Petition, 808 votes;

Blomen and Taylor, Industrial Government Party, Nominated by Petition, 285 votes;

Mitchell and Zagarell, Communist Party, U. S. A., Nominated by Petition, 415 votes;

Cleaver and Terry, Peace and Freedom Party, Nominated by Petition, 935 votes;

McCarthy, Nominated by Petition, 585 votes.

1,606,307 Total Ballots

170 Scattered Votes

(Affidavit of Assistant Secretary of State Forrest Talbott in support of motion to dismiss, November 8, 1968.)

After the November 5, 1968 general election, the appellants moved to amend the complaint, adding paragraphs stating that the Communist Party of Minnesota would participate in future Minnesota election. The appellees moved to dismiss the complaint on the ground of mootness (Appellant motion to amend complaint, October 9, 1968; affidavit of Betty M. Smith, November 2, 1968).

The three-judge court granted the motion to amend the complaint and the motion to dismiss on July 14, 1969 without considering the merits of appellants' claims, except in the granting of the temporary relief (Opinion of the three-judge court, July 14, 1969, Appendix).

The three-judge court did not adopt the position of the U. S. Attorney, nor did it pass on the merits of the appellants claims in its granting of temporary relief (Opinion of the three-judge court, October 2, 1968, Appendix).

The Questions Presented Are Substantial

1. ***A court cannot grant temporary relief and then claim that the granting of the temporary relief causes the original action to become moot and not an actual controversy when a federal statute remains in effect which can be used to inhibit appellants' electoral activities.***

Though the election in 1968 in which the appellant candidates were on the ballot is a past event, the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, retains the same force and effect as it had prior to that election. No formal judicial decision on the merits of the appellants' constitutional claims has been made which will govern future application of said statute to appellants' political plans. Appellees are thus free to repeat their past conduct and continue to hold that the Communist Control Act of 1954 prohibits allowing the candidates of the Communist Party from appearing on the ballot.

Not only are appellees free to continue their past interpretation but, in a hearing before Chief Judge Devitt on November 25, 1968, after the election, concerning appellants' motion to amend their complaint and appellees' motion to dismiss, the then Solicitor General of Minnesota, Richard Kyle, representing the appellee Attorney General of Minnesota, stated that the appellee Attorney General will continue to hold that 50 U. S. C. §§841 and 842 prohibits Communist Party candidates from appearing on Minnesota ballots:

> "The Court: On another subject, I notice that counsel's affidavit says on information and belief he has learned that you, or the attorney general, are go-

ing to persist in your viewpoint so that if some other Communist affiliated people file, you are going to take the same position.

Is there any basis for this information and belief?

Mr. Kyle: I think there probably is. At least there is no new case law which has come down which would, as far as I am concerned, dictate a different result, ultimately" (Transcript of hearing, November 25, 1968, pp. 7-8).

Moreover, in an official published opinion of the appellee Attorney General, the Attorney General ruled that 50 U. S. C. §§841 and 842 bar Communist Party candidates from the ballot and said, "However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings."

This Court stated in *Moore* v. *Ogilvie*, 89 S. Ct. 1493, 1494 (1969), that the fact of the past occurrence of an election did not require dismissal of a complaint based on official practices in that election where there was a strong indication of future repetition:

"Appellees urged in a motion to dismiss that since the November 5, 1968 election has been held, there is no possibility of granting any relief to appellants and that the appeal should be dismissed. But while the 1968 election is over, the burden which *MacDougall* v. *Green*, *supra*, allowed to be placed on the nomination of nominees for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935. The problem is therefore 'capable of repetition, yet evading review,' *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 515."

Though the appellant candidates did appear on the Minnesota General Election ballot on November 5, 1968, as they desired, *only the order of the court below made that event possible.* But for that order, the appellees, Minnesota Attorney General and Minnesota Secretary of State, would have adamantly continued to refuse to accept appellants' petition for nomination and to place appellant candidates' names on the ballot. Their acquiescence to appellants' requests was solely due to the court order below.

In *Gray* v. *Sanders*, 372 U. S. 368, 375 (1963), this Court stated, in reference to a procedurally similar circumstance:

> "Moreover, we think the case is not moot by reason of the fact that the Democratic Committee voted to hold the 1962 primary on a popular vote basis. But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition, the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and longstanding. For if the case was dismissed as moot appellants would be 'free to return to . . . [their] old ways.' *United States* v. *W. T. Grant Co.*, 345 U. S. 629".

See, e.g., Bohler v. *Lane*, 204 F. Supp. 168, 173 (D. Fla. 1962); *Morris* v. *Williams*, 149 F. 2d 703, 708 (8th Cir. 1945); *Heilberg* v. *Fixa*, 236 F. Supp. 405, 407 (N. D. Cal. 1964); *Friends* v. *United States*, 388 F. 2d 579, 581 (D. C. Cir. 1967); and *Tyson* v. *Cages*, 363 F. 2d 742, 743 (5th Cir. 1966).

The position maintained by the appellee Attorney General is the result of an interpretation of an Act of Con-

gress which is still in effect and force. Thus, the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, provides an independent basis for the appellees' official position and, thereby, establishes a "firmly embedded" policy.

The uncontradicted affidavit of Mrs. Betty M. Smith, stating that the Communist Party will participate in future Minnesota elections, indicates that a controversy still exists which requires judicial resolution to prevent an identical repetition of events at the next election (Affidavit of Betty M. Smith, November 22, 1968).

This court has consistently granted review and decided election cases after the November 5, 1968 general election. *Brockington v. Rhodes*, cert. granted February 24, 1969, 37 L. W. 3301; *Allen v. State Board of Elections, Fairley v. Patterson, Bunton v. Patterson* and *Whitley v. Williams*, 393 U. S. 544 (1969); *Moore v. Ogilvie*, 394 U. S. 814 (1969) (May 6, 1969); *Hadnott v. Amos*, 394 U. S. 358 (1969); and *Hall v. Beals*, probable jurisdiction noted May 5, 1969.

The three-judge court readily allowed the appellants' motion to amend the complaint. The three-judge court distinguished election cases in the U. S. Supreme Court following the November 5, 1968 election as cases involving firmly embedded state policies as expressed in the statutes in the states involved (Opinion of the three-judge court, July 14, 1969, Appendix).

This case involves a firmly embedded state policy to bar Communist Party candidates from the ballot. The appellee Attorney General published an opinion, which will certainly be followed by all state election officials, advising that 50 U. S. C. §§841 and 842 bars Communist Party candidates from the ballot. While Attorney General opin-

ions are not binding, they will be followed by all state officials unless the state official wishes to challenge the ruling by court action. It is quixotic to think that any state official could possibly have an interest in defending Communist Party candidates' rights to appear on the ballot, and instituting lawsuits on their behalf. Therefore, unless the Communist Party candidates are allowed judicial resolution of the merits of their claims, the appellee Attorney General ruling will, practically speaking, have the force of a statute. Moreover, the appellee Attorney General, in his published opinion, called for judicial resolution of the questions.

The three-judge court in granting temporary relief did not adopt the U. S. Attorney's position that 50 U. S. C. §§841 and 842 does not bar Communist Party candidates from the ballot, and there is authority in a case in another state, the only opinion interpreting 50 U. S. C. §§841 and 842, in regard to Communist candidates, ruling that state Communist Party candidates are barred from the ballot. *Salwen* v. *Rees,* 108 At. 2d 265 (1954).

The three-judge court, in its opinions of October 2, 1968 and July 14, 1969, acknowledged that there are serious constitutional objections to 50 U. S. C. §§841 and 842; the U. S. Attorney in his *amicus curiae* brief to the three-judge court admitted that there are serious constitutional objections to 50 U. S. C. §§841 and 842; and Mr. Justice Harlan, in the only case in this Court dealing with 50 U. S. C. §§841 and 842, *Communist Party, U. S. A.* v. *Catherwood,* 367 U. S. 389 (1961), admitted that there were serious constitutional objections to 50 U. S. C. §§841 and 842. The merits of appellants' claims should be determined.

2. *The Communist Control Act, 50 U. S. C. §§841 and 842, is an unconstitutional bill of attainder.*

The Communist Control Act of 1954 sets out a Congressional finding that the organization entitled the Communist Party of the United States is guilty of membership and participation in a foreign-controlled seditious conspiracy. 50 U. S. C. §841. Upon such finding, it terminates all rights, privileges and immunities of that named organization. 50 U. S. C. §842.

A bill of attainder has been defined as a legislative pronouncement that a particular named person or a group of persons must be punished for committing certain acts. Punishment has been deemed to include deprivation of rights and privileges available to other citizens. *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 321, 323, 326, 18 L. Ed. 356 (1867); *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366 (1867); *United States* v. *Lovett*, 328 U. S. 303, 314-316 (1946); and *United States* v. *Brown*, 381 U. S. 437 (1965).

This Court has held that an act which specifically names the Communist Party and withholds some right or privilege from members of that named group available to others is a bill of attainder. *United States* v. *Brown, supra.* In commenting on *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961), the *Brown* Court stated: "A majority of the Court rejected the argument that the Act was a bill of attainder, reasoning that Section 3 does not specify the persons or groups upon which the deprivations set forth in the Act are to be imposed, but instead sets forth a general definition. . . ." 367 U. S. at 451.

The majority in *Communist Party, U. S. A.* v. *SACB, supra,* clearly agreed that if the Act had applied to the Communist Party by name, it would have been an illegal bill of attainder. It is clear that under the prior decisions of the Court the Communist Control Act should be declared an unconstitutional bill of attainder.

In the only case to consider the constitutionality of the Communist Control Act of 1954, 50 U. S. C. §§841 and 842, this Court in *Communist Party, U. S. A.* v. *Catherwood, supra,* held that the Act did not intend to prohibit the Communist Party from being an employer, and thus the constitutional questions were not decided.

3. *The Communist Control Act, 50 U. S. C. §§841 and 842, is an unconstitutional ex post facto law.*

An ex post facto law has been defined as a law which imposes punishment for activity which was not punishable at the time it was committed. *Cummings* v. *Missouri, supra.* In *Cummings,* an oath which required persons engaged in many professions in Missouri after the Civil War to state, among other things, that the affiant had not engaged in any past conduct hostile to the United States, was held to be unconstitutional as an illegal ex post facto law.

The Court held that a deprivation of rights, in that case the right to pursue one's profession, was punishment and the statute was therefor an ex post facto law.

50 U. S. C. §§841 and 842 deprives the Communist Party of the United States of all rights, privileges and immunities, thus constituting a punishment under the above cases, solely on the basis of a legislative determination based upon supposed past conduct of that named organization. Therefore, the Act is an ex post facto law prohibited by the Constitution.

4. *The Communist Control Act, 50 U. S. C. §§841 and 842, violates freedom of speech, press, assembly and petition.*

Minority political parties utilize the electoral forum to espouse their political ideology and to propose solutions for the problems that face society. By being able to participate in formal election procedures, they can attain a larger and more attentive audience than they could through use of other less effective vehicles for public debate.

This Court has often stated that the First Amendment was designed to provide the widest and most complete dissemination of pertinent information to the public so that the electorate can promote a viable governmental system through well informed choices of public officials and representatives. *Associated Press* v. *United States,* 326 U. S. 1 (1944); *Stromberg* v. *California,* 283 U. S. 35 (1931).

Fundamental to participation in electoral politics is the right to assemble together for a common purpose or discussion of public matters. "Effective advocacy . . . is undeniably enhanced by group association". *National Association for the Advancement of Colored People* v. *Alabama,* 357 U. S. 449, 460 (1958).

Official action designed to restrain operation of these and related rights has a "chilling effect" on speech, and on the entire electoral process itself.

5. *The Communist Control Act, 50 U. S. C. §§841 and 842, violates due process.*

Governmental regulation must have a real and substantial relation and be restricted to the evil with which it claims to contend. *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934); *Butler* v. *Michigan,* 352 U. S. 380, 383 (1957).

The Act purportedly is designed to protect the national security from activities which constitute a clear and present danger to the United States. However, the Act is not restricted to prohibition or control of dangerous activities but denies the Communist Party all its rights, including the right to engage in lawful, peaceful conduct such as participation in electoral politics.

A statute must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a potential interest of the state." *Cantwell* v. *Connecticut*, 310 U. S. 296, 311 (1940); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966). Legislative abridgment of fundamental personal rights must be narrow and consistent with the least drastic means to achieve a valid purpose. *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *N. A. A. C. P.* v. *Alabama*, 377 U. S. 288 (1964); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

The Act is vague, overbroad, not reasonably related to the evil which it purports to control, and thereby violates due process of law.

6. *The Communist Control Act, 50 U. S. C. §§841 and 842, violates procedural due process.*

This Court has consistently held that a governmental denial of liberty or property must be preceded by certain fundamental procedures of fairness. The Fifth Amendment prohibits Congress from depriving an organization of liberty or property without according it a hearing on the charges against it which are relied upon to support the deprivation. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951). Minimally, a hearing must be provided to determine the validity of alleged facts.

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79 (1916); *Manley* v. *Georgia*, 279 U. S. 1 (1929); and *Tot* v. *U. S.*, 319 U. S. 463 (1943).

The Act does not provide any procedural safeguards to those to be punished, not even a hearing. Instead, 50 U. S. C. §841 finds that the Communist Party of the U. S. is a criminal conspiracy designed to overthrow the U. S. government, and 50 U. S. C. §842 deprives that organization of liberty and property solely on the basis of legislative fiat.

7. *The appellees' action in refusing appellants' nominating petition deprived appellants of due process and equal protection of the law.*

An unfair discrimination operating to deprive someone of the right to vote is a deprivation of due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments. *Baker* v. *Carr*, 369 U. S. 186; *Reynolds* v. *Sims*, 377 U. S. 533 (1963); and *Carrington* v. *Rash*, 380 U. S. 89 (1965).

8. *The dismissal of the complaint by the court below deprives appellants of equal protection of the law by requiring appellants to follow additional procedures not required of other political candidates.*

This Court has held that a denial of equal protection of the law results from requiring certain political candidates or advocates of certain pieces of legislation to comply with procedures not required of other candidates or advocates, or to suffer certain burdens not required of those other candidates or advocates. *Hunter* v. *Erickson*, 393 U. S. 389 (1969); *Reitman* v. *Mulkey*, 387 U. S. 369 (1967); *Anderson* v. *Martin*, 375 U. S. 399 (1964).

Hunter v. *Erickson, supra,* struck down an amendment to the Akron, Ohio city charter which required any ordinance dealing with racial, religious or ancestral discrimination in housing to be approved by a referendum at a general or regular election before taking effect. This amendment required additional procedures to be followed in enacting this specific legislation, making it more difficult to enact this legislation as opposed to other legislation. See also, *Anderson* v. *Martin,* 375 U. S. 399 (1964).

If the decision of the three-judge court dismissing the complaint is allowed to stand, it will be necessary for Communist Party candidates to initiate a fresh lawsuit at the time of each and every election. With the inherent time limitations in litigation, a strong possibility exists that the merits of appellants' contentions will not be reached when further lawsuits are brought. Communist Party candidates will have to file a lawsuit, be granted a temporary injunction, and face dismissal of the suit after the election. Though the Communist Party candidates might still attain a position on the printed ballot, they will have to conform to this procedure of judicial interference which no other candidate need follow, which violates equal protection of the law.

9. *The Communist Control Act of 1954, 50 U. S. C. §§841 and 842, is not within the legislative power of Congress in that Article II, Section 1, Clause 2 of the United States Constitution limits federal control over the qualifications of presidential electors.*

Article II, Section 1, Clause 2 of the U. S. Constitution provides:

"Each State shall appoint, in such Manner as the Legislature thereof may direct; a Number of Electors,

equal to the whole number of Senators and Representatives to which the State may be entitled in Congress. . . ."

This provision narrowly limits the power of the federal government to interfere with the qualifications of presidential electors. This Court has stated that the States possess nearly exclusive control over the qualifications of presidential electors. *Fitzgerald* v. *Green*, 134 U. S. 377, 379, 380 (1890) and *McPherson* v. *Blacker*, 146 U. S. 1, 35 (1902).

Of course the federal government does retain power to control corrupt practices and to protect the right of all citizens to vote in presidential elections without discrimination. However, these areas of control relate to protection of the electoral process itself, and of the constitutional rights of the voters and office seekers. A prohibition of members of the Communist Party from the ballot denies constitutional liberties of the electorate and the appellants.

CONCLUSION

Jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion and Judgment of Three-Judge Court on October 2, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

vs.

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

PATRICK J. FOLEY, United States Attorney for the District of Minnesota, Minneapolis, Minnesota, as *Amicus Curiae.*

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

This expression is occasioned by the complaint of the Communist Party candidates for President and Vice-President of the United States and others allied with them in interest[1] against Joseph L. Donovan who, as the Secretary of State of Minnesota, is the public official charged with the administration of the election machinery of the State, and Douglas M. Head, Attorney General of Minnesota, growing out of the refusal of Secretary of State Donovan to accept for filing the nominating petition for the presidential and vice-presidential candidates of the Communist Party.

The plaintiffs request temporary and permanent relief ordering Secretary of State Donovan to accept the tendered nominating petition (which allegedly contains the names of 2,394 qualified electors of the State of Minnesota), and to place the names of the Communist Party candidates on the 1968 general election ballot. Further relief is requested in the form of a declaration of the inapplicability, or in the alternative the constitutional invalidity, of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. This law is the apparent authority for the Secretary of State's refusal to accept the plaintiffs' petition.

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[1] The other plaintiffs are: The Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

At a hearing held September 17, 1968, briefs were filed and arguments heard relating to the jurisdiction of the court over the subject matter of the controversy and the necessity and propriety of convening a statutory three-judge court. While answers to the questions of jurisdiction and the necessity of a statutory three-judge court are not completely clear, the court, acting through a single judge, has made an initial determination that jurisdiction does exist, 28 U. S. C. A. §§1331, 1343, and that a statutory three-judge court should be convened to further consider the issues involved. 28 U. S. C. A. §§2282, 2284. *Flast* v. *Cohen*, 392 U. S. 83, 88 S. Ct. 1942 (1968).

Circuit Judge Harry A. Blackmun of the Court of Appeals for the Eighth Circuit, Chief District Judge Edward J. Devitt, and District Judge Philip Neville, both of the District of Minnesota, the judges designated under authority of 28 U. S. C. A. §§2282 and 2284, heard oral arguments on the issues on September 30, 1968, following notice given on September 24, 1968 to counsel for all parties and to the United States Attorney for the District of Minnesota. In accordance with the provisions of 28 U. S. C. A. 2403, the Attorney General of the United States was notified by the court that the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, was drawn in question, and was advised that he would be permitted to intervene for the presentation of evidence, if evidence were otherwise admissible in the case, and for arguments on the question of the constitutionality of the law.

Extensive briefs have been filed on the questions of jurisdiction, the necessity that the matter be determined by a statutory three-judge court, the granting of preliminary

relief, and the applicability of, and the constitutionality of, the Communist Control Act of 1954.

It is not unlikely that a decision on the merits of this matter would involve a determination of the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. Since the passage of that Act there has been scant judicial or legislative consideration of its meaning and scope. In essence, the law contains a finding that the Communist Party and its adjuncts are a menace to the United States and should be outlawed (§841), and expresses a determination that the rights, privileges, and immunities normally attendant upon such bodies are terminated (§842).

The interdiction is broad and general in its terms, and jabs at the very core of our traditional constitutional freedoms. It is thus not a matter to be considered lightly. Its breadth and generality render its applicability to situations like the present a question not admitting of hurried solution. The results of a determination of the relevant issues on their merits may well have far-reaching national effect. The constitutionality of the Act is not settled, nor have the issues apparently involved in this case ever received authoritative judicial consideration. The Supreme Court of the United States has interpreted the Act on only one occasion. *Communist Party of the U. S. A.* v. *Catherwood*, 367 U. S. 389, 81 S. Ct. 1465 (1961). In that case a decision on the constitutional question involved was avoided. But the court did imply a criticism of "the vague terminology" of §842 of the Act. The court observed that:

> "The statute contains no definition, and neither committee reports or authoritative spokesmen attempt to

> give any definition, of the clause 'rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof.'" 367 U. S. at 392, 393.

The question of validity of the Act, while not passed upon, was noted to contain "novel constitutional questions." 367 U. S. at 393. These observations might well be taken as a skeptical, if not jaundiced, view of the constitutional validity of the Act.

An examination of the expressions of the United States Supreme Court in other cases involving the control of allegedly subversive organizations, and cases in other areas involving similar constitutional doubts, may well be looked to as a harbinger of the probable view of the court if called upon in an appropriate case to pass upon the constitutionality of the Communist Control Act of 1954.

Because attempted legislative control of subversive groups and activities often involves curtailment of fundamental constitutional freedoms, the Supreme Court has required that the standards of clarity and specificity be applied with particular stringency to such statutes. At least two provisions of the Subversive Activities Control Act of 1950, sections which on their face are narrower and more specific than the statute here involved, have been stricken down as vague and overbroad. *United States* v. *Robel*, 389 U. S. 258, 88 S. Ct. 419 (1967); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 84 S. Ct. 1659 (1964). See also, Note, "Recent Developments in Communist Control Act Prosecutions," 16 W. Res. L. Rev. 206 (1964).

In the case before us, issues involving rights of suffrage, free speech, and free association are involved. Only the

most delicate control in such areas is to be tolerated. *Whitehill* v. *Elkins,* 389 U. S. 54, 88 S. Ct. 184 (1967); *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 328 (1963); *Cramp* v. *Bd. of Publ. Instr. of Orange Cty., Fla.,* 368 U. S. 278, 82 S. Ct. 275 (1961). Legislative exclusions of the sort here being considered may be bills of attainder. *United States* v. *Brown,* 381 U. S. 437, 85 S. Ct. 1707 (1965).

The complaint, affidavits, briefs, and the oral arguments presented have raised substantial doubts regarding the Act's applicability and constitutional validity. These doubts are of sufficient proportion to warn that hurried arguments and precipitous decision of the issues would be unwise.

A "Memorandum for the United States as Amicus Curiae," has been filed over the signature of Patrick J. Foley, United States Attorney, advising that in his view the Communist Control Act is inapplicable to this case. He urges that the Act is meant to disable the Communist Party as a party only and not its members, and he suggests that the right of plaintiffs Mitchell and Zagarell to appear on the ballot, and the right of the nominees for presidential electors to be credited with the votes cast for Mitchell and Zagarell, depend in no degree on their status as nominees of the national or local Communist Party. He argues that, as a matter of Minnesota law, Mitchell and Zagarell are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and concludes that no "right, privilege or immunity" of the Communist Party as such is involved in this lawsuit. It is therefore his view that the Communist Control Act of 1954 does not prohibit the Secretary of State from accepting the nominating peti-

tions and including the nominees upon the ballot as candidates of the Communist Party.[2]

The Government also cites the "familiar rule that the decision of constitutional questions should be avoided where fairly possible," *Communist Party of the U. S. A.* v. *Catherwood, supra*, and urges that we should "hesitate long" before adopting an interpretation that requires resolution of "difficult constitutional questions." 367 U. S. at 394.

The brief of the United States admits the seriousness of many of the plaintiffs' constitutional challenges to the law. Claims that the law is a bill of attainder, that it unjustifiably abridges First Amendment rights and the rights to vote and to run for elective office, and that Congress lacks power to establish qualifications for presidential electors are recognized as being substantial and raising difficult constitutional questions.

Because of the grave doubts which exist as to the constitutionality of the Communist Control Act, and in light of the amicus curiae position of the United States Attorney as to the inapplicability of the Act to the situation here, and his strong suggestions regarding its constitutional infirmities, it would be unwise for us, on such short notice, to attempt to resolve the issues on their merits. Additionally, it should be noted that the Attorney General of the United States, upon receipt and consideration of the statutory notice sent to him pursuant to 28 U. S. C. A. §2403, as to the pendency of the constitutional issues, may care to intervene, offer evidence, and make argument as he has a right to do. He should be afforded sufficient opportunity

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[2] At least one court, when presented with a similar problem, has observed that the Act reaches only to the prevention of the specific label, "Communist Party," from appearing on the ballot. *Salwen* v. *Rees*, 16 N. J. 216, 108 A. 2d 265 (1954).

and time to present his views. See also, 28 U. S. C. A. §§516 and 517.

But, time is of the essence here. If a decision on the merits were not reached by October 7, 1968, probably the last date when the ballots must be delivered to the printer, the nominated candidates would not have a place on the printed ballot for the November 5, 1968 general election, and the plaintiffs, assuming some merit in their contentions, would be deprived of their individual constitutional rights. The plaintiffs have also sought to show that the lack of an expeditious resolution of the issues involved will substantially impede their proposed electioneering campaign in Minnesota.

On the other hand, the defendants have not urged, nor is there apparent, any grave or irreparable harm which would result from the grant of the requested temporary relief directing the placement of the Communist Party ticket on the ballot pending final disposition of the issues. It has been there several times before with unimpressive voter response.[3]

Thus, while the court finds and concludes that possible serious injury will accrue to the plaintiffs if the names of Charlene Mitchell and Michael Zagarell as Communist Party candidates for President and Vice-President do not appear on the printed ballet, it has found no discernible

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[3] According to the records in the office of the Minnesota Secretary of State, the Communist Party vote for President in Minnesota for the years 1924-1940 is as follows:

			Voting
1924	William Z. Foster—Workers Party	4,427	835,002
1928	William Z. Foster—Workers Communist	4,853	999,823
1932	William Z. Foster—Communist	6,101	1,003,009
1936	Earl Browder—Communist	2,574	1,120,179
1940	Earl Browder—Communist	2,711	1,257,491

probable injury which the defendants or the citizens of Minnesota will suffer if these names are placed on the ballot. A well-informed, intelligent electorate such as exists in the State of Minnesota undobutedly will be able fairly to discern and make appropriate decision upon the merits of the principles advocated by the Communist Party candidates and their sponsors.

IT IS THEREFORE ORDERED

That the defendant, Joseph L. Donovan, as Secretary of State of Minnesota, absent any prohibitive Minnesota law, accept for filing the nominating petition of the plaintiffs and, if upon examination thereof he determines that the petition complies in all respects with the requirements of the pertinent Minnesota statutes, he is directed to cause the names of the plaintiffs, Charlene Mitchell and Michael Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States, to be placed on the ballot for the November 5, 1968 general election.

This expression is intended to comply with Rule 52 of the Federal Rules of Civil Procedure.

The Clerk is directed to return the nominating petition to plaintiffs' counsel.

Dated: October 2, 1968.

HARRY A. BLACKMUN
Harry A. Blackmun, *Circuit Judge*

EDWARD J. DEVITT
Edward J. Devitt, *Chief District Judge*

PHILIP NEVILLE
Philip Neville, *District Judge*

NEVILLE, *District Judge.*

I concur in the action taken by the court since it grants purely temporary relief. Personal disagreement on my part with the philosophy and teachings of Communism obviously does not furnish an answer to the question presented in this lawsuit. Assuming, as I do, the validity and truth of the findings made by Congress and recited in the Communist Control Act of 1954, the court, nevertheless is urged by plaintiffs to declare the Act unconstitutional. Congress declared the Communist Party to be "an instrumentality of a conspiracy to overthrow the Government of the United States," whose policies and programs "are secretly prescribed for it by the foreign leaders of the world Communist movement." Its existence was found to be "a clear present and continuing danger to the security of the United States" and the statute concludes "Therefore, the Communist Party should be outlawed."[1] The question of the validity of the Communist Control Act goes to the very bowels of our constitutional framework.

I would prefer to bottom jurisdiction on 42 U. S. C. §1983 (Civil Rights Act) and 28 U. S. C. §1343 rather than on 28 U. S. C. §1331. Although in voting cases, proof of the monetary value of the denial of the right to vote to one or to many people perhaps can or at least might well be presumed to be worth the jurisdictional $10,000 amount, sections 1983 and 1343 require no financial amount to be involved. It seems clear to me that the Secretary of State here acted "under color of [a] statute" of Minnesota. The action of the Secretary of State determining that a statute permitting filing as a political candidate by petition did not

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[1] 50 U. S. C. §841.

[2] Minn. Stat. §202.09.

apply, for whatever reason, is acting under color of state law. Failure or refusal to apply a law is as much "action under color of law" as is the reverse. Also I agree that a three-judge court is proper.

I take issue with the court's opinion insofar as it expresses *grave* doubts as to the constitutionality of the Communist Control Act. I do not mean to say that it is free from all doubt. Further I believe that the United States Supreme Court, if and when it considers this case, may well conclude that if it permits the Communist Party to be on the ballot little, if anything, will be left of the Communist Control Act. Nevertheless I subscribe to the temporary relief granted by this court because of the shortness of time, the inability fully to study the problem and all its facets, and the belief that, balancing the equities, less harm results from granting the temporary relief than denying it.

Philosophically in a true democracy the majority should rule and whatever it votes or determines should prevail. Yet inherent in this concept are the seeds of self-destruction. Should the majority vote into power persons who avowedly urge and effect the overthrow of the present form of government, then no longer is there a democracy or the Republican Form of government guaranteed to the states by the United States Constitution.[3] Under the "clear and present danger" test prescribed by Holmes,[4] Congress found, or at least expressed the fear, that such might happen.

Philosophers and political scientists have pointed to the "paradox of freedom" and have held to the view that the

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[3] U. S. Const. art. IV §4.

[4] *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

principle of freedom cannot require that one can make the decision not to be free. It is not freedom to be allowed to destroy freedom.[5] It has been said that the best test of truth is the power of thought to get itself accepted in the marketplace. Many contend, however, that a democratic form of government should protect its freedom from those who disbelieve in its theory and would abandon and deny traditional civil liberties.

The court's opinion herein notes that the Supreme Court has held restrictions on the activities of individual Communists unconstitutional in situations where the statute attempted to prohibit an avowed Communist from working in a defense plant;[6] from holding an office in a labor union;[7] from obtaining a passport;[8] and in another case where benefits were sought to be denied the Communist Party as an employer under state unemployment laws.[9] These cases are, it seems to me, distinguishable, and relate to the movement and civil rights of particular individuals and are quite separate from and not precedent for the question of whether by the ballot we should give our democracy the right by democratic process to vote to destroy itself.

This most difficult question need not be and is not now decided. I feel, however, that while doubts as to constitutionality are not nearly as grave as the court's opinion

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[5] See Auerbach, The Communist Control Act of 1954, 23 U. CHI. L. REV. 173 (1956) containing a discussion at 188 et seq. on the freedom to abdicate liberty. A number of writers holding generally to this view are cited and quoted. See also Comment, The Communist Control Act of 1954, 64 YALE L. J. 712, 738 (1955).

[6] *U. S.* v. *Robel*, 389 U. S. 258 (1967).

[7] *U. S.* v. *Brown*, 381 U. S. 437 (1965).

[8] *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

[9] *Communist Party* v. *Catherwood*, 367 U. S. 389 (1961).

would indicate,[10] small harm can come from permitting the candidates to be on the ballot for this particular election; whereas if they are excluded and the court should be in error in such a decision some persons will have been deprived of their right to be candidates and others of their right to vote for such candidates. Therefore, I concur.

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[10] *Dennis* v. *United States*, 341 U. S. 494, 509 (1951), wherein the Court said:

> "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when leaders feel the circumstances permit, action by the Government is required."

But *see Communist Party* v. *Control Board*, 367 U. S. 1 (1961), dissenting opinion of Justice Black at 137:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. . . ."

Opinion and Judgment of Three-Judge Court on July 14, 1969

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA—THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

—vs.—

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, and DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declara-

tory relief based on issues arising from the conduct of the 1968 Presidential Election in Minnesota as it pertained to candidates running under the banner of the Communist Party. Defendants move for dismissal, asserting mootness.

This action, for injunctive and declaratory relief, was commenced in September, 1968 by Charlene Mitchell, the Presidential candidate of the Communist Party, and others,[1] against Secretary of State Donovan and Attorney General Head, of the State of Minnesota. The plaintiffs sought an order requiring Secretary Donovan to place the names and party designation of the Communist Party candidates for President and Vice-President of the United States on the ballot for the general election of November 5, 1968. Additionally, the plaintiffs sought a declaration that the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, the purported authority for the defendants' refusal to accept plaintiffs' nominating petition, is inapplicable to the present situation, or in the alternative, is constitutionally invalid.

In response to the original complaint, probable jurisdiction was noted, 28 U. S. C. A. §1343, and a statutory three-judge court was convened, 28 U. S. C. A. §§2282, 2284, to consider further the issues raised by the pleadings. After oral arguments, and study of briefs from the parties and the United States Attorney as *amicus curiae*, the court, in a memorandum opinion and order dated October 2, 1968, granted temporary relief in the form of an order directing defendant Donovan, as Secretary of State of

[1] The other plaintiffs are: the Vice-presidential candidate of the Communist Party, the Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

Minnesota, to accept for filing the nominating petition of plaintiffs, and upon a finding that the petition complied in all respects with the pertinent Minnesota statutes, to place the names of plaintiffs Mitchell and Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States on the ballot for the November 5, 1968 general election. That Memorandum and Order, containing a more detailed exposition of facts and reasoning, is reported as *Mitchell* v. *Donovan*, 290 F. Supp. 642 (D. Minn. 1968).

By affidavit with attached exhibits, it appears that defendant Donovan complied with the order of this court, and that the November 5, 1968 general election ballot contained the names "Mitchell and Zagarell" with the subdesignation "Communist Party USA/Nominated by Petition."[2]

On October 10, 1968, the plaintiffs moved to amend their complaint by adding allegations that the Communist Party plans to participate in Minnesota local, state, and national elections which occur after November 5, 1968, and that upon "information and belief," it appears that Attorney General Head will continue to advise Minnesota election officials that the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842 bars the Communist Party or any candidates running under its express endorsement from participating in any and all Minnesota elections.

One week after the November 5, 1968 general election the defendants moved to dismiss the complaint on the ground that "the issues involved in this litigation have become moot and that there is no longer any justiciable issue to be tried before this court."

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[2] The plaintiff Mitchell and her running mate tallied 415 votes

[3] See e.g., *Moore* v. *Ogilvie*, — U. S. —, 89 S. Ct. 1493, 37

In our view the issues raised by the original pleadings are now moot since the plaintiffs' nominating petitions were accepted and their names and their party designation were placed on the ballot for the 1968 Presidential elections.

By their tendered amendment to the complaint, plaintiffs seek to have us rule for the future on the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842, on the theory that Communist Party candidates may seek some position on a Minnesota ballot in some future election and that the person who is Attorney General of Minnesota at that time may take a position that the provisions of the Communist Control Act of 1954 prevent such filing.

We readily allow the motion to amend the complaint, yet view the issues thus shaped as inappropriate for adjudication and dismiss the complaint because, in our view, such issues do not present a "controversy" as required by the United States Constitution, Article III, and the express language of the Declaratory Judgment Act, 28 U. S. C. A. §2201.[3]

It is fundamental that the Declaratory Judgment Act provided a judicial remedy, but did not repeal the cardinal standard of federal jurisdiction that a federal court may not decide what is not a "case or controversy." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510 (1941); *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461 (1937). In *Maryland Casualty*, the Court said:

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[3] "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall be reviewable as such."

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 312 U. S. at 273.

That constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact, the course of a federal litigant seeking declaratory relief is in a sense the more exacting, for,

> "the Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Assoc., Inc. v. Rickover*, 369 U. S. 111, 112, 82 S. Ct. 580 (1962).

Put in another way, the Declaratory Judgment Act,

> "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Ser. Comm'n of Utah v. Wycoff Co.*, 344 U. S. 237, 241, 73 S. Ct. 236 (1952).

Here are guideposts which the United States Supreme Court has set as to when declaratory relief should be granted.

"(W)hen all of the axioms have been exhausted and all the words of definition have been spent, the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the function and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting the relief in the cases for which it is designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature intervention, especially in the field of public law. A maximum of caution is necessary in the type of litigation we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed or final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Ser. Comm'n of Utah* v. *Wycoff Co., supra,* 344 U. S. at 243-4.[4]

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[4] Chief Justice Hughes expressed similar principles many years before in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227 (1937) as follows:

"The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.' (citations omitted) . . .

"A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete,

Applying these principles to this case, it appears to us that no issue is here ripe for decision; that a disagreement, if it exists between the litigants, is nebulous and conjectural, not fixed and final in shape; and that no useful purpose would be served by a declaration of rights.

It is not at all certain that candidates will seek to run on the Communist Party Ticket at the next or at subsequent elections, albeit the affidavit of Mrs. Betty M. Smith, the State Secretary of the Minnesota Communist Party, alleges such future intention. From 1949 to 1968, no person sought to run on the Communist ticket in Minnesota for any public office. Of course, it is certain that future elections will be staged in Minnesota, but the bare certainty that future elections will be held is not enough. *Fair* v. *Dekle*, 367 F. 2d 377 (5th Cir. 1966), *cert. den.* 386 U. S. 996.

But even assuming that some candidate were to run for some office under the label of the Communist Party at some future election, it is not certain that at such future election the then Attorney General of Minnesota will be the same person who now holds that office or, if so, that he will take the same legal position that was taken by the Minnesota Attorney General in connection with the 1968 election. The present Minnesota Attorney General has not said he will view the Communist Control Act of 1954 as prohibiting persons from seeking ballot positions in future elections. In view of the now expressed opinion of the

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touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." 300 U. S. at 239-241.

legal officers of the United States Government that the Communist Control Act of 1954 does not apply to the plaintiffs, it is doubtful if the Attorney General of Minnesota will presume to take a contrary position involving the interpretation of this federal statute at a future election.

The plaintiffs cite several decisions involving voting rights cases, particularly some just decided or now pending in the United States Supreme Court[5] as authority for the proposition that this court should entertain and adjudicate this case. In each of the cited cases, however, the plaintiffs were suffering under an adverse lower court ruling, the appeals were all perfected prior to the November 5, 1968 election, the issues were fixed and final in shape, and most important of all, these cases involve firmly-imbedded state policies concerning election rights as expressed in the statutes of the States involved.

There is no firmly-imbedded state policy in Minnesota as expressed by statute or otherwise at issue here, but only the possibility of a future adverse legal opinion by a then Attorney General of Minnesota on an uncertain issue as yet unformed. The statute involved is a federal, not a state, one. As noted, the view of the chief legal officer of the United States, speaking through his United States Attorney, is that the constitutionality of the Communist Control Act of 1954 is not involved and, in his view, the statute by its application does not prohibit the plaintiffs from the positions on the ballot which they sought.

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[5] See e.g., *Moore* v. *Ogilvie*, ——— U. S. ———, 89 S. Ct. 1493, 37 U. S. L. W. 4389 (May 5, 1969); *Hadnott* v. *Amos*, ——— U. S. ———, 89 S. Ct. 1101 (1969); *Allen* v. *State Board of Elections*, 393 U. S. 544, 89 S. Ct. 817 (1969); *Brockington* v. *Rhodes*, probable jurisdiction noted, 393 U. S. 1078, 89 S. Ct. 877 (1969).

So, in summary,

1. The issue as originally framed is moot because the election is over and plaintiffs were on the ballot as requested.

2. As to the future, there is no certainty or finality as to the issues sought to be adjudicated because there is no certainty as to whether any future candidates for office in a Minnesota election may seek to run under the banner of the Communist Party and if they do, that the issues formed by their attempted filing may be the same as they are in this lawsuit. Further, there is no certainty that the issues sought to be adjudicated in the present lawsuit will be similarly viewed by the Attorney General of Minnesota holding office at the time of a future election. The issues as raised by the pleadings do not represent any fixed or firm state policy governing elections which should be examined. In our view, therefore, the issues upon which decision is requested here, are nebulous and contingent—not fixed and final—as required by the Supreme Court.

3. At all events, no constitutional issue has been definitely joined in the present lawsuit because the United States Attorney General, charged with the duty of defending the constitutionality of the statutes of the United States, expressed the view that no constitutional issue was present and agreed with the plaintiffs that a proper interpretation of the law is that the plaintiffs were entitled to be placed on the ballot at the 1968 election as they requested. The United States Attorney General agrees with the plaintiffs' view of the law: the Minnesota Attorney General, by his motion for dismissal, does not care to contest the issue. In such a stance, who is there to oppose the plaintiffs?

4. No useful purpose would be served by a declaration of rights.

In the words of Justice Brennan, in a most recent decision of the United States Supreme Court, the constitutional question, if one exists,

> ". . . must be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, —— U. S. ——, 89 S. Ct. 956, 960 (1969).

And, as the United States Supreme Court said in *United Public Workers of Amer. (CIO)* v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556 (1947):

> "The power of courts . . . to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." 330 U. S. at 89-90.

All the plaintiffs assert here is a "hypothetical threat" of a possible constitutional issue as yet unframed.

There is no "actual controversy" as is required by the Constitution, by a long line of Supreme Court decisions, and by the express wording of the Declaratory Judgment Act.

The complaint is therefore DISMISSED.

Dated: 7/14/69

HARRY A. BLACKMUN, *Circuit Judge*

EDWARD J. DEVITT, *Chief District Judge*

PHILIP NEVILLE, *District Judge*